



Billing Code: 4410-02-P

## **DEPARTMENT OF JUSTICE**

### **28 CFR Part 16**

**[CPCLO Order No. 007-2019]**

### **Privacy Act of 1974; Implementation**

**AGENCY:** United States Department of Justice, Federal Bureau of Investigation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Bureau of Investigation (FBI), a component of the Department of Justice (Department or DOJ), has published a notice of a modified Privacy Act system of records, “National Crime Information Center (NCIC),” JUSTICE/FBI-001. In this notice of proposed rulemaking, the FBI proposes to amend the existing regulations exempting the NCIC from certain provisions of the Privacy Act in order to provide greater clarity on the reasons for the exemptions, including interference with the FBI's mission to detect, deter, and prosecute crimes and to protect the national security. Additionally, the NCIC’s current Privacy Act exemption regulations refer to alternative procedures for individuals to access their criminal history record information. However, criminal history record information is maintained in the Next Generation Identification (NGI) System, JUSTICE\_FBI 009, (May 5, 2016), and therefore the access provisions for criminal history record information are more appropriately set forth in the Privacy Act exemption regulations for NGI. The alternative process for accessing criminal history record information is set forth in the Code of Federal Regulations. The amendments to the NCIC’s Privacy Act exemption regulations do not affect an individual’s ability to access his criminal history record information. The Department proposes to amend its Privacy Act

regulations by amending the existing Privacy Act exemptions for records in the NCIC, as set forth below. Public comment is invited.

**DATES:** Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may send comments by any of the following methods:

- E-mail: *privacy.compliance@usdoj.gov*. To ensure proper handling, please reference the CPCLO Order No. in the subject line of the message.
- Fax: 202-307-0693. To ensure proper handling, please reference the CPCLO Order No. on the cover page of the fax.
- Mail: United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, 145 N St., NE, Suite 8W-300, Washington, D.C. 20530. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes. To ensure proper handling, please reference the CPCLO Order No. in your correspondence.
- Federal eRulemaking Portal: *http://www.regulations.gov*. When submitting comments electronically, you must include the CPCLO Order No. in the subject box. Please note that the Department is requesting that electronic comments be submitted before midnight Eastern Daylight Savings Time on the day the comment period closes because *http://www.regulations.gov* terminates the public's ability to submit comments at that time. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received.

*Posting of Public Comments:* Please note that all comments received are considered part of the public record and made available for public inspection online at

*http://www.regulations.gov* and in the Department's public docket. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase **PERSONAL IDENTIFYING INFORMATION** in the first paragraph of your comment. You must also place all personal identifying information that you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase **CONFIDENTIAL BUSINESS INFORMATION** in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, may be posted online and placed in the Department's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph, below.

**FOR FURTHER INFORMATION CONTACT:** Katherine M. Bond, Assistant General Counsel, Privacy and Civil Liberties Unit, Office of the General Counsel, FBI, 935 Pennsylvania Avenue, NW., Washington, DC 20535-0001, telephone 202-324-3000.

**SUPPLEMENTARY INFORMATION:**

**National Crime Information Center**

The FBI has established a modified Privacy Act system of records, “National Crime Information Center (NCIC),” JUSTICE/FBI-001. Established in 1967, the NCIC is a national criminal justice information system linking criminal (and authorized non-criminal) justice agencies located in the 50 states, the District of Columbia, U.S. territories and possessions, and selected foreign countries to facilitate the cooperative sharing of criminal justice information. The NCIC provides a system to receive and maintain information contributed by participating agencies relating to criminal justice and national security. Information maintained in the NCIC is readily accessible for authorized criminal justice purposes by authorized users via text-based queries (i.e., using names and other descriptive data). The FBI has previously published exemptions from the Privacy Act for the NCIC. See 28 CFR 16.96(g) through (i). In this notice of proposed rulemaking, the FBI proposes to amend the existing regulations exempting the NCIC from certain provisions of the Privacy Act in order to provide greater clarity on the reasons for the exemptions, including interference with the FBI's mission to detect, deter, and prosecute crimes and to protect the national security.

**Executive Orders 12866 and 13563–Regulatory Review**

In accordance with 5 U.S.C. 552a(j) and 552a(k), this proposed action is subject to formal rulemaking procedures by giving interested persons an opportunity to participate in the rulemaking process “through submission of written data, views, or arguments,” pursuant to 5

U.S.C. 553. The purpose of this proposed rule is to clarify the Privacy Act exemptions taken for the NCIC and explain the rationales therefore. This rule does not raise novel legal or policy issues, nor does it adversely affect the economy, the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients thereof in a material way. The Department of Justice has determined that this rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Information and Regulatory Affairs within the Office of Management and Budget pursuant to Executive Order 12866.

### **Regulatory Flexibility Act**

This proposed rule will only impact Privacy Act-protected records, which are personal and generally do not apply to an individual’s entrepreneurial capacity, subject to limited exceptions. Accordingly, the Chief Privacy and Civil Liberties Officer, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

### **Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E–Congressional Review Act)**

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, 5 U.S.C. 801 *et seq.*, requires the FBI to comply with small entity requests for information and advice about compliance with statutes and regulations within FBI jurisdiction. Any small entity that has a question regarding this document may contact the person listed in the FOR FURTHER INFORMATION CONTACT paragraph, above. Persons can obtain further information regarding SBREFA on the Small Business Administration’s Web page at

[http://www.sba.gov/advo/archive/sum\\_sbrefa.html](http://www.sba.gov/advo/archive/sum_sbrefa.html). This proposed rule is not a major rule as defined by 5 U.S.C. 804 of the Congressional Review Act.

#### **Executive Order 13132–Federalism**

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### **Executive Order 12988–Civil Justice Reform**

This proposed regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

#### **Executive Order 13175–Consultation and Coordination With Indian Tribal Governments**

This proposed rule will have no implications for Indian Tribal governments. More specifically, it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, the consultation requirements of Executive Order 13175 do not apply.

#### **Unfunded Mandates Reform Act of 1995**

This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000, as adjusted for inflation, or more in any one year, and it will not significantly or uniquely affect small

governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires that the FBI consider the impact of paperwork and other information collection burdens imposed on the public. There are no current or new information collection requirements associated with this proposed rule. The records that are contributed to this system are created by the FBI or other law enforcement and governmental entities. Sharing of this information electronically will not increase the paperwork burden on the public.

### **List of Subjects in 28 CFR Part 16**

Administrative Practices and Procedures, Courts, Freedom of Information, and the Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940-2008, 28 CFR part 16 is proposed to be amended as follows:

### **PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION**

1. The authority citation for part 16 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

2. Amend §16.96 by:

- a. Revising paragraph (g) and (h) and
- b. Removing paragraph (i).

The revisions read as follows:

**§ 16.96      Exemption of Federal Bureau of Investigation Systems—limited access.**

\* \* \* \* \*

(g) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G) (H), and (I), (e)(5), (e)(8), (f), and (g):

(1) National Crime Information Center (NCIC) (JUSTICE/FBI-001).

(2) These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j) and (k). Where the FBI determines compliance with an exempted provision would not appear to interfere with or adversely affect interests of the United States or other system stakeholders, the FBI in its sole discretion may waive an exemption in whole or in part; exercise of this discretionary waiver prerogative in a particular matter shall not create any entitlement to or expectation of waiver in that matter or any other matter. As a condition of discretionary waiver, the FBI in its sole discretion may impose any restrictions deemed advisable by the FBI (including, but not limited to, restrictions on the location, manner, or scope of notice, access or amendment).

(h) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) the requirement that an accounting be made available to the named subject of a record, because this system is exempt from the access provisions of subsection (d). Also, because making available to a record subject the accounting of disclosures from records concerning him/her would specifically reveal law enforcement or national security investigative interest in the individual by the FBI or agencies that are recipients of the disclosures. Revealing this information could compromise ongoing, authorized law enforcement and intelligence efforts, particularly efforts to identify and defuse any potential acts of terrorism or other potential violations of criminal law. Revealing this information could also permit the record subject to obtain valuable insight concerning the information obtained during any



investigation and to take measures to circumvent the investigation (e.g., destroy evidence or flee the area to avoid investigation).

(2) From subsection (c)(4) notification requirements because this system is exempt from the access and amendment provisions of subsection (d) as well as the accounting disclosures provision of subsection (c)(3). The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases.

(3) From subsection (d), (e)(4)(G) and (H), (e)(8), (f) and (g) because these provisions concern individual access to and amendment of law enforcement and intelligence records and compliance could alert the subject of an authorized law enforcement or intelligence activity about that particular activity and the investigative interest of the FBI and/or other law enforcement or intelligence agencies. Providing access could compromise sensitive law enforcement information; disclose information that could constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; provide information that would allow a subject to avoid detection or apprehension; or constitute a potential danger to the health or safety of law enforcement personnel, confidential sources, and witnesses. The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases with subjects of the information.

(4) From subsection (e)(1) because it is not always possible to know in advance what information is relevant and necessary for law enforcement and intelligence purposes. Relevance

and necessity are questions of judgment and timing. For example, what appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after information is assessed that its relevancy and necessity in a specific investigative activity can be established.

(5) From subsections (e)(2) and (3) because it is not feasible to comply with these provisions given the nature of this system. The majority of the records in this system come from other federal, state, local, joint, foreign, tribal, and international agencies; therefore, it is not feasible for the FBI to collect information directly from the individual or to provide notice. Additionally, the application of this provision could present a serious impediment to the FBI's responsibilities to detect, deter, and prosecute crimes and to protect the national security. Application of these provisions would put the subject of an investigation on notice of that fact and allow the subject an opportunity to engage in conduct intended to impede that activity or avoid apprehension.

(6) From subsection (e)(4)(I), to the extent that this subsection is interpreted to require more detail regarding the record sources in this system than has already been published in the Federal Register through the SORN documentation. Should the subsection be so interpreted, exemption from this provision is necessary to protect the sources of law enforcement and intelligence information and to protect the privacy and safety of witnesses and informants and others who provide information to the FBI.

(7) From subsection (e)(5) because in the collection of information for authorized law enforcement and intelligence purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With time, additional facts, or analysis, information may acquire new significance. The restrictions imposed by subsection (e)(5) would limit the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on

investigations and impede the development of criminal intelligence necessary for effective law enforcement. Although the FBI has claimed this exemption, it continuously works with its federal, state, local, tribal, and international partners to maintain the accuracy of records to the greatest extent practicable. The FBI does so with established policies and practices. The criminal justice and national security communities have a strong operational interest in using up-to-date and accurate records and will foster relationships with partners to further this interest.

Dated: August 28, 2019

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Peter A. Winn  
Acting Chief Privacy and Civil Liberties Officer  
United States Department of Justice

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